UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

AMERICAN MEDICAL RESPONSE OF SOUTHERN CALIFORNIA
Respondent

and **Cases 31–CA–169600**
31–CA–169601

USW LOCAL 12-01853,
Charging Party.

Nikki N. Cheaney, Esq.,
for the General Counsel.
Daniel F. Fears and *Christopher Taylor, Esqs. (Payne & Fears LLP),*
for the Respondent.
Steven Sullivan, Staff Representative (USW Local 12-01853),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

LISA D. THOMPSON, Administrative Law Judge. On February 11, 2016, the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, Local 12-01853, AFL, CLC (USW Local 12-01853 or the Union) filed an unfair labor practice (ULP) charge against American Medical Response of Southern California (Respondent or AMR), alleging violations of the National Labor Relations Act (NLRA or the Act).[1] That same day, the Union filed a second ULP charge against Respondent.[2] On March 1, 2016, the Union amended its first charge. The Regional Director for Region 31 (Regional Director) consolidated both charges and issued a consolidated complaint and notice of hearing on May 31, 2016.

The consolidated complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act when it: (1) denied employee Kyle Graham his request for a union representative during an investigative interview; and (2) failed to furnish the Union with information and documents it requested in connection with incidents involving Mr. Graham and AMR employee Harry Stone. Respondent filed its answer denying all material allegations and setting forth its affirmative defenses to the complaint.

[1] Case 31–CA–169600.
[2] Case 31–CA–169601.

This case was tried before me in West Los Angeles, California, on August 23, 2016. During the hearing, the parties settled Case 31–CA–169601 in its entirety and the "failure to furnish" allegations in Case 31–CA–169600. Accordingly, the only issue tried before me was the alleged 8(a)(1) denial of Mr. Graham's request for union representation.

All parties were afforded a full opportunity to appear, introduce evidence, examine, and cross-examine witnesses, argue orally on the record, and file post-hearing briefs. After carefully considering the entire record, including the demeanor of the witnesses and the parties' post-hearing briefs, I find that Respondent did not violate the Act as alleged in the complaint.[3]

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, AMR has been a corporation with offices and places of business in San Bernardino County, California (herein the Redlands and Rancho Cucamonga facilities). AMR has been furnishing emergency and non-emergency medical and ambulance services.

It is undisputed that, in conducting its business operations, Respondent derived gross revenues in excess of $500,000. Respondent purchased and received at its Redlands and Rancho Cucamonga facilities products, goods, and materials valued in excess of $5,000 directly from points outside the State of California. Accordingly, I find that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also undisputed that, at all material times, USW Local 12-01853, is the bargaining unit representative for emergency medical technicians (EMTs) and paramedics at Respondent's Redlands and Rancho Cucamonga facilities. Accordingly, the parties admit, and I find, that USW has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

It is undisputed that Kyle Graham (Graham) was employed by Respondent as an EMT working out of Respondent's Redlands and Rancho Cucamonga divisions. On November 19, 2015, Graham was terminated for making a threat and violating company policy and procedure. After reviewing the entire record, I find the facts that gave rise to the alleged ULP charge in this complaint, are as follows:

In November 2015, Graham learned that Operation Manager Dave Molloy (Molloy) was planning to terminate Lindsey Schutten, Graham's coworker and girlfriend. Thereafter, on November 6, 2015, Graham told his coworker, Amanda Fonseca (Fonseca) "it is looking like people are getting their way around here. I'll explain tomorrow, but if things go the way they are

[3] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Jt. Exh." for Joint Exhibit, "GC Exh." for the General Counsel's exhibits, "R. Exh." for Respondent's Exhibits, "GC Br." for the General Counsel's brief, and "R. Br." for Respondent's brief. Specific citations to the transcript and exhibits are included where appropriate to aid review, and are not necessarily exclusive or exhaustive.

looking, I'll come shoot everyone here."[4] When Fonseca looked at him, Graham stated, "Not you, but there's one person in particular" that he planned to shoot—which was Molloy, the person Graham believed was going to fire Schutten.[5] Graham also asked for nitroglycerin and indicated he wanted to take the nitroglycerin to calm down.[6]

Fonseca was concerned about Graham's comments so she reported them to Operations Supervisor Dennis Valencia (Valencia). Valencia asked Fonseca to submit a written incident report detailing Graham's statements, and she complied.[7]

Valencia told Molloy about Graham's statements and gave him Fonseca's incident report. After receiving Fonseca's report, Molloy contacted his supervisor, General Manager (now San Bernardino Regional Director) Rene Colarossi (Colarossi) as well as Human Resources (HR) Manager Ruby Johnson (Johnson) to determine how to respond to Graham's comments. Because of the nature of Graham's statements, Colarossi and Johnson considered them threats and instructed Molloy to call the police for guidance and advice.

Thereafter, Molloy drove to the Redlands Police Department where he met with Officer Curtis Hankins (Hankins). Molloy explained what transpired, the nature of Graham's threats, provided Hankins with a copy of Fonseca's report, and asked for Hankins' guidance on how to handle the situation.[8] Officer Hankins told Molloy that he would come to Respondent's Redlands facility to talk to Graham and perform a threat assessment. Officer Hankins asked Molloy to arrange to have Graham meet with him at Respondent's facility.

The substance of what occurred next turn on an evaluation of credibility.[9] Having carefully reviewed the record, and based on the documentary evidence and testimony of Officer Hankins, I find the following facts:

Molloy returned to the office and instructed Valencia to have Graham return to the office so Graham could meet with Officer Hankins about Graham's alleged threats. Valencia called Graham while Graham was in the field and told Graham that he needed to return to the office because Molloy wanted to speak to him.

Graham testified that he requested a union representative three times when he learned Molloy wanted to meet with him. However, as I will discuss in more detail later in this decision,

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[4] Tr. 107, 117–118; see also R. Exh. 5.

[5] R. Exh. 5.

[6] Id.

[7] R. Exh. 5.

[8] Tr. 162–163; see also Jt. Exh. 2.

[9] I have based my credibility findings on multiple factors, including, but not limited to, the consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the witness' demeanor while testifying; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. *Daikichi Sushi*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir. 1997), cert. denied 522 U.S. 948 (1997). Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony. *Daikichi Sushi*, supra at 622.

I do not find Graham's testimony credible on this point.

Graham testified that, once Valencia informed him that Molloy wanted to meet with him, Graham asked Valencia whether he needed a union representative for the meeting. According to Graham, Valencia responded that he "didn't think so." However, I credit Valencia's testimony where he vehemently denied that Graham ever asked him about union representation during their telephone discussion.

Moreover, Graham testified that, a few minutes later, he called Valencia again to clarify their previous conversation about the meeting. Valencia repeated that he was instructed to pick up Graham and return him to the office for a meeting with Molloy. According to Graham, he asked a second time whether he needed a union representative but Valencia said "no." However, again, I credit Valencia's testimony that Graham never mentioned union representation during their second conversation.

Contrary to Graham's testimony, I find that, once Valencia told Graham that he needed to return to the office to meet with Molloy, Valencia picked up Graham in the field and they returned to the office. Once Valencia and Graham arrived in the office entryway, they were met by Molloy, Hankins, and Corporal Goff (Goff). Graham never asked for a union representative while the men stood in the entryway. As they walked from the entryway to the conference room, Hankins asked if someone from AMR would be present as the officers questioned Graham to which Molloy replied that he would. Valencia did not participate in the meeting.

Relying on Officer Hankins' testimony, I find that the four men entered the conference room together, wherein Graham asked Hankins if he was being arrested. Hankins replied that he did not intend to arrest Graham but wanted to question him. Hankins asked whether he made any statements about "shooting up the place" or shooting his coworkers earlier that morning. Graham admitted to making the statements but only in a joking manner. Graham told Hankins and Goff that he had no intention of shooting anyone and made the statements out of frustration upon learning that his girlfriend was going to be terminated. Molloy remained quiet during Hankins' questioning.

Hankins next asked Graham about the nitroglycerin, to which Graham stated he made the comment to his coworker in jest while restocking the drug and jokingly mentioned taking two nitroglycerin tablets to help his elevated blood pressure. Graham confirmed that he did not take any nitroglycerin tablets and never intended to harm himself. Again, Molloy did not ask Graham any questions.

At that point, Hankins asked Graham if he would consent to a search of his vehicle and residence so they could check for any weapons. Graham consented and advised Hankins and Goff that he did not own any weapons other than several BB guns. Graham asked Molloy if he would suffer any disciplinary action as a result of his statements. Molloy told Graham that management would conduct its own investigation into the events but emphasized that Respondent took threats very seriously. Graham apologized and the men left the conference

room. At no time during the entire exchange did Graham ask for a union representative.[10]

Because Graham was without transportation, Valencia drove Graham to the deployment center (where Graham left his vehicle) and Hankins and Goff followed behind them. Hankins and Goff searched Graham's vehicle and found no weapons therein.[11] At that point, Valencia returned to the office, then Graham drove to his apartment and the officers followed behind him. Again, Hankins and Goff searched Graham's apartment and found no weapons. Thereafter, Hankins returned to the station and drafted a written report outlining the incident.[12] Molloy also provided a written statement to HR describing the incident.[13] Graham was placed on unpaid leave pending the conclusion of Respondent's investigation regarding the events of that day.

On or about November 11, 2015, HR Manager Johnson arranged a telephone interview with Graham to investigate the November 6 incident. As soon as Johnson identified herself, Graham requested to have a union representative present on the call. Respondent complied, ended the interview and rescheduled the call for November 16, 2015.[14]

On November 16, 2015, HR Manager Johnson held a telephone interview with Graham, Union Representative Justin Montonya (Montonya) and Operations Supervisor Chris Cardenas (Cardenas). During the interview, Graham admitted to the comments attributed to him but stated that he made the statements out of frustration when he learned Molloy was going to fire his girlfriend.[15] Cardenas took notes from the interview and confirmed with Graham and Montonya that he accurately captured Graham's statements.[16] It is undisputed that, at no time during the interview, did Graham (or Montonya) mention that Graham had previously requested and was denied a union representative when the Redlands Police questioned him on November 6.

Subsequently, on November 19, 2015, Graham was terminated from his employment due to his workplace threat. On November 28, 2015, the Union filed a grievance over Graham's termination.[17] It is undisputed that, at no time did the Union's grievance mention or raise the fact that Graham previously requested and was denied a union representative when the Redlands Police questioned him.[18]

In making the above factual findings, I relied primarily on the testimony of Officer Hankins. First, Hankins is a disinterested witness who has no allegiance to Graham, the Union or Respondent. Second, Hankins' testimony was corroborated by Molloy and Valencia, who I found mostly credible. Third, Hankins was specific, direct and straightforward in his testimony and had great recall of the events surrounding the incident. His tone and demeanor was measured and even-tempered which left me believing he was telling the truth.

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[10] Tr. at 108–109, 164, 167, 170.

[11] Valencia did not participate in any way in the search of Graham's vehicle.

[12] Jt. Exh. 3.

[13] Jt. Exh. 2.

[14] R. Exh. 1.

[15] Jt. Exh. 1.

[16] Tr. 56–57, see also Jt. Exh. 1.

[17] R. Exh. 3.

[18] Id.

In contrast, I found Graham's testimony less than fully credible for several reasons. First, Graham admitted that, prior to this incident, he had always been provided with union representation (when requested) when he was involved in prior disciplinary proceedings.[19] Graham appeared articulate and confident about his right to union representation and clearly testified as to his understanding of the circumstances under the parties' Collective-Bargaining Agreement (CBA) that trigger his *Weingarten* rights.[20] With such knowledge, I cannot imagine Graham participating in such an investigative interview with the Redlands Police if he requested and was denied union representation.

Moreover, Molloy and Valencia testified that they were intimately familiar with relevant sections of the CBA concerning employees' requests for representation and have never denied such a request. In fact, there was no evidence presented that Molloy or Valencia ever denied such a request from any employee. As such, I find it difficult to believe that, Respondent, with a history of complying with Graham's (and other employees') request for union representation, would all of a sudden deny a request on this occasion.

Third, although Graham testified that another coworker overheard him asking Valencia whether he needed a union representative present for the meeting with Molloy (and the Redlands Police), he never told management about this corroborating witness at any time during his investigative interview or, more importantly, in his Union grievance. I also note that this coworker was never called as a witness by the General Counsel at the hearing. The fact that Graham never mentioned this witness to anyone at any time during the investigation and failed to mention the witness during the grievance process struck me as extremely suspicious and made his testimony and version of events unreliable.

Fourth, there were significant discrepancies in Graham's version of events. For example, although Graham testified that he asked Valencia about union representation three times, in his Board affidavit (also known as his *Jencks* statement), he attested to only two instances. When Respondent's counsel raised this discrepancy during cross examination, Graham replied that he forgot to include the third instance. This struck me as odd especially given Graham's purported recall of and testimony about all of the facts and circumstances of the incident.

In addition, after Graham admitted that he never told management, HR or even the Union that he had been denied his request for union representation, when asked for an explanation, he either had none or thought the venue was inappropriate to raise the issue. Yet, curiously, the first time Graham raised the issue of being denied union representation—an issue that certainly could have had a profound effect on his employment—was when the instant ULP charge was filed, approximately three months after the alleged incident. As such, I find Graham's failure to timely raise the denial of his request for representation at critical times during the investigation and the

[19] Tr. 38–39.

[20] See R. Exh.4, Secs. 7.4A-B. Sec. 7.4A of the CBA states that an employee who requests union representation will be allowed that representation during an investigative interview. Sec. 7.4B provides that, once the employee requests such representation, Respondent will afford the employee (and in essence the Union) 24 hours advance notice of the investigatory meeting so that the employee can secure representation. Testimony elicited at the trial reveals that Sec. 7.4A must occur before the provisions of Sec. 7.4B.

timing when he eventually raised it extremely suspicious and made Graham's version of events less than fully credible.

Lastly, while Graham appeared composed, articulate and well spoken, he was visibly hostile on cross examination. In fact, Graham was often reluctant to answer some of Respondent's counsel's questions and oftentimes appeared as if he was searching for a plausible explanation for certain actions. Moreover, I noted that Graham's testimony was direct and specific on events that appeared favorable to him but was evasive in his answers when questioned by Respondent's counsel. Overall, viewing the totality of the circumstances, Graham's testimony, and particularly, some of the discrepancies in his version of events and the lack of plausible explanations for some of his actions, I did not find Graham's testimony credible.

Accordingly, I find that Graham failed to request union representation at any time when he learned about or was being interviewed/investigated by the Redlands Police over the threatening statements he made to shoot everyone, including Molloy, at Respondent's workplace on November 6, 2015. Thereafter, Graham was placed on unpaid leave pending Respondent's investigation into Graham's comments. Once Respondent's HR scheduled his investigative interview, Graham requested union representation, and the meeting was rescheduled to accommodate his request. The interview was rescheduled to November 16, wherein Graham's union representative was present. Graham was questioned about the events in question where he admitted making the threatening statements attributed to him. Subsequently, after reviewing all of the evidence, Respondent terminated Graham effective November 19, 2015.

III. Discussion and Analysis

The complaint alleges, and the General Counsel and Charging Party contend, that Respondent violated Section 8(a)(1) when it denied Graham's request for union representation during an investigative interview with the Redlands Police into threats he made on November 6, 2015. Respondent denies the allegation, essentially arguing that Graham never requested representation at any time prior to or during the meeting. Alternatively, Respondent argues that, even if Graham requested representation, he was not entitled to it since the meeting was an investigative interview conducted by the Police not Respondent. For the reasons set forth below, I agree with Respondent that Graham never requested representation; and as such, do not find that a violation occurred.

A. Legal Principles

Section 7 of the Act gives employees the right "to insist on the presence of a [union] representative at an investigatory interview that could, or which the employee reasonably believes would, result in disciplinary action."[21] *Weingarten* rights, as they are more commonly known, apply only to fact-finding interviews not announcements of predetermined discipline.[22] In order for an employee to invoke his/her *Weingarten* rights, the employee must: (1) reasonably

[21] *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 256 (1975).

[22] *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979).

believe that the investigation at issue will result in disciplinary action, and (2) request union representation.

The test for determining whether an employee reasonably believes an interview might result in disciplinary action is an objective one viewing the totality of the circumstances of the case as opposed to the employee's subjective motivation.[23] Requests that trigger an employee's *Weingarten* rights are liberal and need only be sufficient to put the employer on notice of the employee's desire for union representation.[24] However, the right to union representation "arise[s] only in situations where the employee requests representation."[25] Moreover, it is not the employer's responsibility to inform the employee of their *Weingarten* rights. Therefore, if the employee fails to make a request for union representation, no *Weingarten* violation occurs.

B. Analysis

Based on the evidence presented, I find that Graham never requested union representation prior to or at the time while the Redlands Police questioned him on November 6, 2015. As stated above, I do not believe Graham's testimony that he was denied union representation after repeated requests for one especially given the fact that he had previously requested and Respondent provided him with representation on every occasion in the past. Moreover, I was struck by the fact that Graham testified that another coworker overheard him request a representative but this was never mentioned to Respondent during the investigation, his termination, his grievance or the ULP charge. Also, it defies common sense that Graham never once complained about being denied representation at any stage of the investigation process especially given his knowledge of his *Weingarten* rights and his familiarity with Respondent's CBA on how to invoke those rights.

Respondent argues that, even if Graham had requested that a union representative be present during his meeting with Molloy and the Redlands Police, he was not entitled to one since the meeting was a police investigation not an investigative interview conducted by Respondent. However, the General Counsel counters that Officer Hankins was acting as a management official of Respondent when he questioned Graham such that Hankins' questioning constituted an investigatory interview by Respondent which would trigger Graham's *Weingarten* rights. I agree with Respondent on this point.

First, there is no credible evidence presented that Graham ever requested to have a representative present during the meeting with Hankins, Goff, and Molloy. Second, and more importantly, counsel for the General Counsel cited no Board authority for the proposition that Hankins was acting as a management official which transformed his questioning into an investigative interview by Respondent.

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[23] See *System 99*, 289 NLRB 723, 727 (1988).

[24] See *E.I. Dupont De Nemours*, 362 NLRB No. 98 (2015) (employee who asked "do I need a union representative for this?" deemed sufficient to trigger Weingarten rights); *Southwestern Bell Telephone Co.,* 227 NLRB 1223, 1227 (1977) (employee who asked supervisor "if they should obtain union representation) constituted request for union representation under *Weingarten*).

[25] *Weingarten*, 432 U.S. at 257; see also *Kohl's Food Co.,* 249 NLRB 75, 78 (1980) (right to union representation is triggered only upon the employee's request for such representation).

While I found no Board or other precedent on whether an employee's request for a union representative during police (versus the employer's) questioning triggers one's *Weingarten* rights, the Board's Division of Advice issued an undated Datz Advice Memorandum that dealt with a somewhat similar scenario.[26] In that case, two employees, McLellan and Reilly, were found drinking at an establishment while on the job. They were interrogated by Underwall, a police officer who also happened to be a supervisor of the employer. During the interrogation, McLellan and Reilly requested a union representative, but their request was denied. While the employer argued that the employees' *Weingarten* rights did not attach since Underwall was acting in his capacity as a police officer, the Advice Memorandum posited,

> In the instant case, we initially conclude that since, as admitted by the Employer, Underwall was acting "as a management official" when he questioned McLellan and Reilly as to their drinking, that questioning constituted an investigatory interview by the Employer as to the possible breach of a work rule. Consequently, *Weingarten* rights would attach to that questioning even though it was conducted by a uniformed police officer.[27]

Although Molloy contacted the Redlands Police to obtain advice on how to address Graham's threatening statements, unlike the situation in the Advice Memorandum, Officer Hankins questioned Graham in his official capacity as a police officer. Moreover, Molloy did not question Graham or hold himself out as a police officer or agent of the Redlands Police department. While the questioning occurred at Respondent's facility (upon the sole recommendation of Hankins), since Hankins did not act "as a management official" of Respondent, I find that the meeting between Hankins, Goff, and Graham was in fact a police interrogation as opposed to an investigative interview conducted by Respondent to which Graham's *Weingarten* rights would not attach.

Lastly, as an alternative argument, counsel for the General Counsel contends that Respondent denied Graham his *Weingarten* rights when Valencia failed to inform Graham about the nature of the meeting with Molloy when Graham asked.[28] Here, counsel for the General Counsel refers to Graham's testimony where Graham asked Valencia why Molloy wanted to meet with him to which Valencia responded that he "didn't know."

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[26] I note that the undated Datz Advice Memorandum has no precedential value but it is used in this Decision only as an illustration of how the Division of Advice (Advice) faced a somewhat similar scenario dealing with what Advice believed constituted a police versus employer investigative interview.

[27] See *New Jersey Bell*, Case 22-CA-15822 (undated).

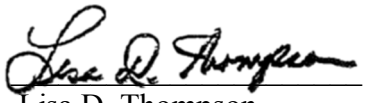
[28] GC Br. at 10-12; see also *Climax Molybdenum Co*. 227 NLRB 1189, 1189–1190 (1977), quoting *Weingarten*, 420 U.S. at 262–263 ("the representative's aid in eliciting facts can be performed better, and perhaps only, if he can consult with the employee beforehand"), enforcement denied on other grounds, 584 F.2d 360, 362 (10th Cir. 1978), see also *Pacific Telephone & Telegraph Co*., 262 NLRB 1048 (1982) (employers must provide employees with the opportunity to consult with their union representative before an investigatory interview that the employee reasonably believes may result in discipline because such consultation advances Weingarten's primary purposes— it enables "the representative to counsel and assist the employee who may be 'too fearful or inarticulate to relate accurately the incident being investigated,'" enforced in relevant part, 711 F.2d 134 (9th Cir 1983).

While I agree with counsel for the General Counsel's position, and there appears to be some legal support for the proposition that, a respondent violates *Weingarten* by refusing to inform an employee of the nature of the matter being investigated, such a violation was not alleged in this case and is therefore untimely.[29] Therefore, like the judge in *Murtis Taylor,* I reach no conclusion as to whether Respondent's refusal to further clarify the subject of the investigative interview between Graham and Molloy (and the Redlands police) amounted to an unfair labor practice.

In sum, the credible evidence clearly demonstrates that Respondent did not provide Graham with a union representative because he failed to request one at any time prior to or during the investigation conducted by the Redlands Police of his threatening statements. I further find that the initial interview conducted by Officer Hankins was a police investigation wherein Hankins was acting in his capacity as a police officer not as a management official of Respondent. Because I conclude that Graham never requested union representation at any time on November 6, 2015, he never invoked his *Weingarten* rights. Lastly, once Respondent conducted its own investigation a few days later, Graham requested that a union representative be present with him during the investigative interview and Respondent complied with Graham's request.

Accordingly, I am persuaded that Respondent did not violate Sections 8(a)(1) of the Act as alleged. For that reason, I recommend that the complaint be dismissed.

Dated: Washington, D.C. February 6, 2017



Lisa D. Thompson
Administrative Law Judge

[29] See *Murtis Taylor Human Services Systems*, 360 NLRB 546 (2014) (Board adopted Administrative Law Judge's [ALJ] finding where judge opined that he could not reach the issue of whether Respondent committed an ULP by refusing to inform a Weingarten representative of the nature of the matter being investigated because such a violation was not alleged in the complaint); see also GC Exhs. 1(a), 1(g), 1(j) at ¶6a-b.